THE SCOPE OF WORKMEN'S COMPENSATION IN THE UNITED STATES

SUMMARY

The ideal not reached in present American laws, 22. — Limitation to accidental injuries, 23. — " Arising out of and in the course of " employment, 29. — " In the course of " employment, 35. — Accident, injury, and disability distinguished, 38. — Faults of employers and employees, 39. — Causation, partial, sole, proximate, 43. — Results in personal injury, 46. — Compensation without disability, 48. — Death, 50. — Non-fatal injuries, disability, 53. — Waiting periods, 54. — Development and test of disability, 59. — Conclusion, 61.

MANY times, for the purpose of sharp contrast with employers' liability, it is said that workmen's compensation laws grant payments for all industrial accidents or injuries. But exactly that never is meant. It is, indeed, the ideal of workmen's compensation to require payments for all disabilities which are fairly due to the employments in which they are incurred and to make industry carry corresponding charges, as industry must carry charges for all injuries to its material capital. And to keep this ideal ever in mind will afford many a minor help to the wise formulation and administration of compensation statutes. But there are plenty of good reasons why the ideal cannot be realized now, or soon.

And certainly American compensation laws are not thus unlimited in scope: they are limited in two general ways. In none of the thirty-three compensation states [1] does the law apply to quite all employments: in one place and another casual labor, farm labor, domestic

[1] The two territories, Alaska and Hawaii, are included; and, for simplicity of expression, all are mentioned as states.

service, employment not for profit, and still other employments are left quite outside the law. And, whatever the employments to which the law may be limited,[1] its scope is narrowed farther by limitations in the causes and results of injuries. It is the prime purpose of this study to examine these narrower limitations, in the causes and results of injuries, as they are found in the present statutes of the American states and territories.[2]

In full conformity with the popular understanding of its purpose and with foreign precedent in the premises, the law in nearly all of the states restricts its benefits to injuries sustained by accidents. In a considerable number of the states the restriction is to be found neither in the sections which directly establish the benefits nor by way of any definition;[3] but in some of these it ap-

[1] The employments covered by American compensation laws are described, as of March, 1915, in " The Field of Workmen's Compensation in the United States " in the American Economic Review for June, 1915 (vol. v, pp. 221–278).

[2] Alaska, c. 71 of 1915. Arizona, c. 14 of 1912, second session. California, (c. 399 of 1911); c. 176 of 1913, amended by cs. 541, 607, and 662 of 1915. Colorado, c. 179 of 1915. Connecticut, c. 138 of 1913, amended by c. 288 of 1915. Hawaii, act 221 of 1915. Illinois, p. 335 of 1913, amended by p. 400 of 1915. Indiana, c. 106 of 1915. Iowa, c. 147 of 1913. Kansas, c. 218 of 1911, amended by c. 216 of 1913. Louisiana, act 20 of 1914. Maine, c. 295 of 1915. Maryland, c. 800 of 1914. Massachusetts, c. 751 of 1911, amended by cs. 172, 571, and 666 of 1912, by cs. 48, 445, 448, 568, 696, 746, 807, and 813 of 1913, by cs. 338, 618, 636, 656, and 708 of 1914, and by cs. 123, 132, 183, 236, 244, and 275 of 1915. Michigan, act 10 of 1912, extra session, amended by acts 50, 79, 156, and 259 of 1913, and by acts 104, 136, 153, 170, 171, and 182 of 1915. Minnesota, c. 467 of 1913, amended by cs. 193 and 209 of 1915. Montana, c. 96 of 1915. Nebraska, c. 198 of 1913. Nevada, (c. 183 of 1911); c. 111 of 1913, amended by c. 190 of 1915. New Hampshire, c. 163 of 1911. New Jersey, c. 95 of 1911, amended by cs. 241 and 368 of 1911, by c. 316 of 1912, by cs. 145, 174, 177, and 301 of 1913, by c. 244 of 1914, and by cs. 59 and 199 of 1915. New York, (c. 816 of 1913); c. 41 of 1914, amended by c. 316 of 1914, and by cs. 167, 168, 615, and 674 of 1915. Ohio, 102 O. L., p. 524, amended by 103 O. L., pp. 72, 95, 396, and 656, by 104 O. L., p. 193, and by 105 O. L., p. 3. Oklahoma, c. 246 of 1915. Oregon, c. 112 of 1913, amended by cs. 76 and 271 of 1915. Pennsylvania, acts 329, 330, 338–343 of 1915. Rhode Island, c. 831 of 1912, amended by cs. 936 and 937 of 1913, and by c. 1268 of 1915. Texas, c. 179 of 1913. Vermont, no. 164 of 1915. Washington, c. 74 of 1911, amended by c. 148 of 1913, and by c. 188 of 1915. West Virginia, c. 10 of 1913, amended by c. 9 of 1915, and by c. 1 of 1915, extraordinary session. Wisconsin, (c. 50 of 1911); c. 599 of 1913, amended by c. 707 of 1913, and by cs. 121, 241, 316, 369, 378, and 462 of 1915. Wyoming, c. 124 of 1915.

[3] California, 12 (*a*). Connecticut, B, 1. Iowa, 1; 10. Massachusetts, II, 1. Michigan, II, 1. New Hampshire, 3. Ohio, 68; 72. Texas, I, 3. West Virginia, 25; 27. Wyoming, 2; 19.

pears to have been taken for granted, as matter of course, and to be implied fairly in references here and there to accidents or accidental injuries.[1] Perhaps only in California, Connecticut, Massachusetts, Ohio, Texas, and West Virginia [2] is the inclusion of other than accidental injuries indicated clearly by the words of the statutes. And in much the greater number of the states the limitations to injuries by accident are both direct and unambiguous.[3] In the popular mind injury by accident has been likely to imply some visible or tangible instrument or medium and a prompt and evident result, as an open wound, a fracture, a sprain, an unmistakable inner lesion, or the like. And something of this narrow meaning has been incorporated in

[1] This principle of interpretation has been adopted authoritatively for Michigan by the Supreme Court of the state in the case of Adams v. Acme White Lead and Color Works, decided July 25, 1914 (182 Mich.; 148 N. W. 485). The court relied, in part, upon the phrases, " accidental injury" and " industrial accident board," found in the title of the act, and upon a number of references to accidents in the body of the law [I, 5; II, 7; II, 11; II, 12; III, 13]. Like ground for a like interpretation may be found for Iowa, in sections 15 and 16; for New Hampshire, in sections 1, 2, 5, and 6; and for Wyoming, in the title and in section 4. The Michigan court relied also, in part, upon the statutory requirement of reports of accidents. But such requirements are not of conclusive significance. They are measurably apart from the essentials of workmen's compensation and well may be included in a law which covers injuries by accident and other injuries also, as, indeed, they are included in Massachusetts (III, 18) and Ohio (99), where it is beyond doubt that injuries other than accidental ones are covered by the law. Nor is the use of such phrases as " accident board " and " accident fund " more significant. Of this California with her accident fund and Massachusetts with her Industrial Accident Board are proof enough. In fact, the Supreme Judicial Court of Massachusetts has spoken specifically to this point, holding that " the name, ' Industrial Accident Board,' which is the administrative body created by part III, is a mere title and cannot be fairly treated as restrictive of its duties " (William Hurle's Case, 217 Mass. 223; 104 N. E. 336).

[2] In the case of Poccardi v. Public Service Commission, decided Jan. 26, 1915 (84 S. E. 242), the West Virginia Supreme Court of Appeals appeared to imply an " accident or untoward event " as the necessary basis of an award. But this case was under the statute of 1913, which included two significant references to accidents (8; 43). Subsequently the legislature of 1915 changed the most significant of these references from *accident* to *injury* (43). There remains, however, one reference to " the accident " as the cause of permanent disabilities (31).

[3] Alaska, 1. Arizona, 66: 71. Colorado, 8, iii. Hawaii, 1. Illinois, 1. Indiana, 2; 76 (*d*). Kansas, 1. Louisiana, 2. Maine, 11. Maryland, 14; 62, 6. Minnesota, 9. Montana, 6 (*q*). Nebraska, 9; 10. Nevada, 1 (*a*); 25. New Jersey, 7. New York, 10; 3, 7. Oklahoma, art. 1, sec. 3, 7; art. 2, sec. 1. Oregon, 12; 21. Pennsylvania, act 338, sec. 301. Rhode Island, II, 1. Vermont, 4. Washington, 3. Wisconsin, 3. Montana and Washington use the term, " fortuitous event," instead of accident.

statutory definitions in a few of the states.[1] In the most, however, no definition has been attempted; so that the exact meaning of accident and, in so far, the exact scope of the law have been left to be determined through experience under the law.

Fortunately, the laws have been construed liberally, where statutory restrictions have not hindered. The commissions and boards and the trial courts have not been always consistent with one another, or even with themselves;[2] but the higher courts, whose decisions will control, in this as in other relations have interpreted the compensation laws with a wise and consistent liberality.

In the United Kingdom injury by accident has been held to include death, rupture, and other injuries from heavy exertion,[3] even aggravation of an existing rupture,[4] breakdown of a weakened organ by ordinary exertion,[5] apoplexy or cerebral hemorrhage resulting

[1] In Louisiana an accident means " an unexpected or unforeseen event, happening suddenly or violently, with or without human fault, and producing at the time objective symptoms of an injury " (38). Very similar, but still narrower, are the definitions of Minnesota (34) and Nebraska (52). In Oregon the compensations are for accidental injuries " caused by violent or external means " (21). Perhaps also there is something of definition intended in the term, " fortuitous event," as used in Montana (6) and Washington (3). See also the references to wilful acts of third parties, note 4, page 32.

[2] The Michigan Industrial Accident Board has held that " where death or disability results from fright, unaccompanied by any immediate physical injury, no compensation can be had " (Pietternella Visser v. Michigan Cabinet Co., Bulletin, No. 3, p. 24); and the Washington Industrial Insurance Commission has ruled that the appearance of hernia, by itself, is not an accident under the act (Third Annual Report, p. 83). At the other extreme, the New York Workmen's Compensation Commission pronounced accidental the death of a workman who closed a long day of very hard work, went to a saloon, bought a cigar, fell asleep in a chair, and died there of angina pectoris brought on by exhaustion (State Department Reports, 1915, vol. iii, p. 395). The Wisconsin Industrial Commission has held that freezing is not an accident (Angelo Aillo v. Milwaukee Refrigerator Transit and Car Co., Fourth Annual Report, p. 18), and that freezing is an accident (Henry Skougstad v. Star Coal Co., Fourth Annual Report, p. 31).

[3] Timmins v. Leeds Forge Co., 16 T. L. R. 521; 2 W. C. C. 10. Fenton v. Thorley and Co., 5 W. C. C. 1. Doughton v. A. Hickman, 6 B. W. C. C. 77. Hewitt v. Stanley Bros., 6 B. W. C. C. 501.

[4] Fulford v. Northfleet Coal and Ballast Co., 1 B. W. C. C. 222.

[5] Clover, Clayton, and Co. v. Hughes, 3 B. W. C. C. 275.

from exertion,[1] muscular strains,[2] heatstroke in the hold of a vessel,[3] sunstroke from unusual exposure,[4] blindness due to exposure in a very high temperature on the steel deck of a steamer,[5] mental shock at sight of injury to a fellow workman,[6] pneumonia from a bruised side,[7] from the inhalation of gases,[8] and from a wetting in a flooded mine,[9] inflammation of the kidneys from standing in a mill-race,[10] anthrax from handling infected wool,[11] and injury by the intentional act of a third party.[12] The principle of discrimination appears to be that an accident must be assignable to a somewhat definite time or occasion. So lead poisoning is not the result of accident,[13] nor is eczema caused by a continued dipping of the hands in carbon bisulphide.[14]

While there are not yet American decisions showing so broad an interpretation in workmen's compensation cases, our principles of judicial construction and the frequently expressed deference of American judges to the British decisions give the British precedents an undeniable authority in this country. Moreover, in certain directions high American courts already have shown directly their liberal understanding of accidental

[1] M'Innes v. Dunsmuir and Jackson, 1 B. W. C. C. 226. Broforst v. Owners of S. S. "Blomfield," 6 B. W. C. C. 613.

[2] Boardman v. Scott and Whitworth, 4 W. C. C. 1. Purse v. Hayward, 1 B. W. C. C. 216.

[3] Ismay, Imrie, and Co. v. Williamson, 1 B. W. C. C. 232. Maskery v. Lancashire S. S. Co., 7 B. W. C. C. 428.

[4] Morgan v. Owners of S. S. "Zenaida," 2 B. W. C. C. 19.

[5] Davies v. Gillespie, 5 B. W. C. C. 64.

[6] Yates v. South Kirby, Featherstone, and Hemsworth Collieries, 3 B. W. C. C. 418.

[7] Lovelady and others v. Berrie, 2 B. W. C. C. 62.

[8] Kelly v. Auchinlea Coal Co., 4 B. W. C. C. 417.

[9] Alloa Coal Co. v. Drylie, 6 B. W. C. C. 398.

[10] Sheeram v. F. and J. Clayton and Co., 3 B. W. C. C. 583.

[11] Turvey v. Brintons, 6 W. C. C. 1; 1 K. B. 328.

[12] Nisbet v. Rayne and Burn, 3 B. W. C. C. 507; 2 K. B. 689. Board of Management, Trim Joint District School v. Kelly, 7 B. W. C. C. 274.

[13] Steel v. Cammell, Laird, and Co., 7 W. C. C. 9.

[14] Evans v. Dodd, 5 B. W. C. C. 305.

injuries by including a case of glanders contracted while handling hides,[1] rupture by heavy exertion,[2] pneumonia attributed to heavy lifting,[3] and a fatal systemic sepsis developing into pneumonia,[4] There are, of course, occasional decisions of less evident liberality. The New Jersey Supreme Court has accepted the general British principle that there can be no accidental injury under the act "when no specific time or occasion can be fixed upon as the time when the alleged accident happened."[5] And, in conformity with this principle, the Michigan Supreme Court has held that lead poisoning is not an accidental injury.[6]

On grounds of general principle, or in the pure theory of workmen's compensation, there is, of course, no reason whatever for restricting benefits to injuries sustained either by accident or in any other particular manner. It should be enough that the injury truly is a consequence of the employment. There are, however, practical reasons for the restriction, or at least intelligible and consistent explanations of it. An accident commonly has been understood to be a sudden, sharp, and brief experience, usually due to some external force or circumstance, likely to attract the attention of the subject and of others, and thus readily fixed in time and connected with a definite environment or employment. On the other hand, injuries received otherwise than by accident, especially the slowly developing ones, are not likely to attract attention for a time and cannot be traced so confidently to their causes. Thus they lend themselves to honest self-deception, as well as to false

[1] Hood and Son v. Maryland Casualty Co., 206 Mass. 223; 92 N. E. 329.

[2] Zappala v. Industrial Insurance Commission, 82 Wash. 314; 144 Pac. 54. Poccardi v. Public Service Commission, 84 S. E. 242.

[3] Bayne v. Riverside Storage and Cartage Co., 181 Mich. 378; 148 N. W. 412.

[4] Reck v. Whittlesberger, 181 Mich. 463; 148 N. W. 247.

[5] Liondale Bleach, Dye, and Paint Works v. Riker, 85 N. J. L. 426; 89 Atl. 929.

[6] Adams v. Acme White Lead and Color Works, 182 Mich.; 148 N. W. 485.

allegations and to frauds against the compensation laws. Here are the explanations both of the common limitation of benefits to accidental injuries and of the somewhat strict definitions of accident which appear in a few of the statutes.[1]

Doubtless it is desirable to prevent frauds against any law and to do this with the minimum of trouble and expense. But the balance of considerations probably weighs against the limitation to accidental injuries. Every unnecessary distinction drawn in a statute becomes a gratuitous source of contention and expense. And certainly there is grave fault in a compensation law which withholds its benefits from any class of disabilities which clearly are caused by the employment of the sufferers. All else being the same, the broader the scope of the laws the better. In the United Kingdom and elsewhere there have been found no insuperable difficulties in administering compensations for the slowly developed disabilities of occupational disease; and the experiences of Connecticut, Massachusetts, and Ohio have proved that in this country compensation laws without the limitation to injuries by accident may be very successful and generally satisfactory to all interested classes.[2] It cannot be without significance that California, after four years with a restricted law, in 1915, has eliminated every limiting reference to accidents.

There are no very instructive data to show the numbers of industrial injuries incurred otherwise than by accident. The reality of a true occupational morbidity and mortality is not doubted; but accidental and other

[1] See note 1 on page 25.

[2] California has covered injuries not by accident only since August 8, 1915. The brief first annual report of the Texas Industrial Accident Board contains no relevant data. And, at this writing, I have been unable to secure a copy of the first report upon the operation of the West Virginia law.

causes are combined in the common statistical statements and comparisons. Quite certainly the injuries not due to accidents make no large part of all injuries; and yet their numbers are much too great to be ignored in the writing of a compensation statute. The table of causes for the 89,694 non-fatal injuries classified in the first annual report of the Massachusetts Industrial Accident Board (248–287) shows convincingly enough that nearly all must have been of accidental origin. Very similar is the teaching of the less satisfactory data from Washington.[1] But in the reported decisions of Massachusetts and Ohio appear not a few cases of compensated injuries not fairly to be pronounced accidental. And in Washington in the year, 1913–14, and in Wisconsin in 1914–15 rather more than 24 per cent of the claims disallowed were rejected as resting upon disabilities which were not the result of accidents.[2]

One limitation, in part fairly implied in the very nature of workmen's compensation, is expressed formally and definitely in most of the statutes in a double phrase borrowed from the British act, which provides awards for injuries by accident " arising out of and in the course of the employment." Twenty-six of the American states have adopted this expression without change,[3] while two others substitute close equivalents.[4]

[1] Annual Reports, 1912, pp. 121, 172, and 173; 1913, p. 104; 1914, pp. 113–118.

[2] Washington, 24.42%, 197 out of 807 (Third Annual Report, p. 80). Wisconsin, 24.56%, 42 out of 171 (Fourth Annual Report, p. 40).

[3] Alaska, 1. Arizona, 66; 71. California, 12 (*a*). Colorado, 8, iii. Connecticut, B, 1. Hawaii, 1. Illinois, 1. Indiana, 2; 76 (*d*). Iowa, 10. Kansas, 1. Louisiana, 2. Maine, 11. Maryland, 14. Massachusetts, II, 1. Michigan, II, 1. Minnesota, 9. Montana, 16. Nebraska, 9; 10. Nevada, 1 (*a*); but see 25. New Hampshire, 3. New Jersey, 7. New York, 10; 3, 7. Oklahoma, art. 1, sec. 3, 7; art. 2, sec. 1. Oregon, 12; 21. Rhode Island, II, 1. Vermont, 4.

In Arizona alone the law does not cover comprehensively all accidental injuries arising out of and in the course of employment, but only such of them as are due wholly or in part to certain specified particular causes. The list of causes specified is broad and includes necessary risks and dangers of the employment, failure of due care, and violation of law; but it is by no means certainly complete.

[4] West Virginia: " in the course of and resulting from " — 25. Wyoming: " a result of their employment and while at work . . . " — 6 (*l*).

The first part of the phrase, "arising out of the employment," taken alone and in its natural and simple meaning, matches so well with the purpose of workmen's compensation that it is not easy to find reasons for obscuring it by the addition of the second. The layman's common sense and the judge's formal interpretation are happily agreed in declaring that the first part refers to the origin or cause of the injury, while the second marks merely the time and circumstances of its occurrence.[1] Let now plain terms be but taken as discreet arbitrators, commissioners, and judges naturally would take them: and not a great many injuries will be found to be caused by an employment outside of its course or time. And, whenever any may so be found, fairly due to the employment, the underlying principle of the law requires that they be compensated.

Were it possible to assume that the American statutes, and the British, have been drawn in ignorance of the course of British and American decisions in employers' liability and workmen's compensation cases, an explanation of the doubled phrasing might be found readily in the draftsmen's purpose to restrict the awards narrowly to injuries sustained in the very hours and minutes of active engagement at the tasks of the employment. And such a purpose would be natural enough in men trained to regard the employer's fault as the necessary condition of his liability and inclined to magnify the difficulty of proving the circumstances of injuries received elsewhere than under the eye of the employer or his representative. But it is manifest that the statutes generally have been prepared by men well informed in the law; and there are British and American decisions too numerous to be cited here in which it has been held that the course of employment is not limited to the time

[1] Fitzgerald v. Clarke and Son, 1 B. W. C. C. 197.

spent actively and directly in the processes of the occupation. "The great weight of authority is to the effect that the relation of master and servant is not suspended from the time a laborer arrives upon the premises and becomes subject to the orders and control of the master until he quits for the day." [1]

But, under the generously construed compensation laws, the course of employment is even broader. It may include riding to or from work in the employer's conveyance,[2] or in a public conveyance by understanding with him,[3] even waiting at the station for a train,[4] and a reasonable amount of time on the employer's premises before and after actual work.[5] It may include a brief intermission for forenoon luncheon,[6] eating noon luncheon on the employer's premises,[7] going from the employer's premises by a way neccessarily used,[8] answering calls of nature,[9] warming one's self within working hours,[10] making toilet preparatory to leaving the premises,[11] and going for pay even outside of regular working hours.[12] It has been held to include even going for a Sunday visit to one's wife [13] and, under special

[1] W. F. Bailey, A Treatise on the Law of Personal Injuries, pp. 61–62, citing cases.

[2] Mole v. Wadworth, 6 B. W. C. C. 129. Daniel Donovan's Case, 217 Mass. 76; 104 N. E. 431. See also, Cicalese v. Lehigh Valley Railway Co., 75 N. J. L. 897; 69 Atl. 166.

[3] Holmes v. Great Northern Railway Co., 2 W. C. C. 19.

[4] Cremins v. Guest, Keen, and Nettlefolds, 1 B. W. C. C. 160.

[5] De Constantin v. Public Service Commission, 83 S. E. 88.

[6] Clem v. Chalmers Motor Co., 178 Mich. 340; 144 N. W. 848.

[7] Blovelt v. Sawyer, 6 W. C. C. 16. See also, Heldmaier v. Cobbs, 195 Ill. 172; 62 N. E. 853.

[8] Emily M. Sundine's Case, 218 Mass. 1; 105 N. E. 433.

[9] Elliott v. Rex, 6 W. C. C. 27. Zabriskie v. Erie Railway Co., 85 N. J. L. 157; 88 Atl. 824; 86 N. J. L. 266; 92 Atl. 385.

[10] Parkinson Sugar Co. v. Riley, 50 Kans. 401; 31 Pac. 1090. Not a compensation case.

[11] Terlecki v. Strauss, 85 N. J. L. 454; 89 Atl. 1023; 86 N. J. L. 708; 92 Atl. 1087. See also, Helmke v. Thilmany, 107 Wisc. 216.

[12] Lowry v. Sheffield Coal Co., 1 B. W. C. C. 1. Riley v. Holland and Sons, 4 B. W. C. C. 155.

[13] Richardson v. Morris, 7 B. W. C. C. 130.

conditions, going to a public house for a glass of beer.[1] In fact, it includes all the time " while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time." [2] It is not easy to see how less liberal interpretations could do practical justice to the employee; and, under such interpretations,[3] there is not in the addition of the second part of the limiting phrase much more than the characteristic prolixity of the legislative draftsman. It might be different were it permissible to construe the phrase, " in the course of employment," as narrowly as laymen naturally incline to construe it.

However, the full expression has been interpreted so generously in British and American courts that it permits awards for nearly or quite all disabilities, or accidental disabilities, which can be traced to the employment of the disabled.[4] An injury arises out of the employment when " there is apparent to the rational

[1] Martin v. Lovibond and Sons, 7 B. W. C. C. 243.

[2] Bryant v. Fissell, 84 N. J. L. 72; 86 Atl. 458.

[3] In a few of the states the liberality of the courts has been curbed somewhat by statutory definitions of the course of employment. The Kansas law declares that the words, " arising out of and in the course of employment," shall not be construed " to include injuries to the employee occuring while he is on his way to assume the duties of his employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence " — 9 (*k*). A Wyoming definition is substantially the same — 6 (*l*). In Minnesota the familiar words do not cover " workmen except while engaged in, on, or about the premises where their services are being performed, or where their service requires their presence as a part of such service at the time of the injury and during the hours of service as such workmen " — 34 (*i*). A Nebraska restriction is the same — 52 (*c*).

[4] Not, however, in quite all states. Iowa allows no compensations for injuries caused " by the wilful act of a third person directed against the employee for reasons personal to him or because of his employment " — 17 (*f*). The same limitation has just been copied in Wyoming — 6 (*m*). Colorado covers no injuries " intentionally inflicted by another " — 8, iii. Vermont, on the other hand, expressly includes " an injury caused by the wilful act of a third person directed against an employee because of his employment " — 58 (*d*); and Hawaii has identically the same provision — 60 (*d*). Pennsylvania also has the more liberal policy, excluding only injuries " by an act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment " (act 338, sec. 301). The Pennsylvania provision was copied verbatim from Minnesota — 34 (*i*).

mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury,"[1] or " when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment, as incidental to it,"[2] and when the risk of it is " reasonably incident to such employment, as distinguished from risks to which the general public is exposed.[3] The liberality of the courts' interpretations may be illustrated by their allowance of awards for death at the hands of an intoxicated fellow employee whose pugnacity in his cups was known to the employer's superintendent,[4] for death by the unintended act of another employer's servant,[5] death met in avoiding the playful prank of a fellow employee,[6] death of an ice driver by lightning while seeking shelter under a tree,[7] death of a bricklayer from the same cause while at work upon a high scaffold,[8] death of a cashier at the hands of robbers,[9] suffocation of a household servant in her room by the burning of the house,[10] the injury of a gamekeeper by poachers,[11] injury due to a fellow employee's disobedience of a foreman's orders,[12] injury by the bite of a stable cat while eating dinner in the employer's stable,[13] injury to canvassers and collectors

[1] Stuart McNicol's Case, 215 Mass. 497; 102 N. E. 697.

[2] Bryant v. Fissell, 84 N. J. L. 72; 86 Atl. 458.

[3] Hopkins v. Michigan Sugar Co., 150 N. W. 325.

[4] Stuart McNicol's Case, 215 Mass. 497; 102 N. E. 697.

[5] Bryant v. Fissell, 84 N. J. L. 72; 86 Atl. 458.

[6] Hulley v. Moosebrugger, 93 Atl. 79.

[7] State ex rel. People's Coal and Ice Co. v. District Court of Ramsey Co., 153 N. W. 119.

[8] Andrew v. Failsworth Industrial Society, 6 W. C. C. 11.

[9] Nisbet v. Rayne and Burn, 3 B. W. C. C. 507.

[10] Chitty v. Nelson, 2 B. W. C. C. 496.

[11] Anderson v. Balfour, 3 B. W. C. C. 588.

[12] Scott v. Payn Bros., 85 N. J. L. 446; 89 Atl. 927.

[13] Rowland v. Wright, 1 B. W. C. C. 192.

while on their rounds afoot[1] and by bicycle,[2] injury to a miner reaching from a car for his fallen pipe,[3] and a fall and injury due to an epileptic seizure.[4]

In regard to the principles apparently involved in some of these cases there is not, however, full agreement among the judges. Fortunately, it is not necessary in an economic study to trace with precision the lines of judicial discrimination. It is enough to note that the courts generally are extremely liberal in holding that injuries have arisen out of and in the course of employment. British courts have been more strict than the New Jersey Supreme Court and have denied compensation to a boy injured in avoiding the pranks of a mate,[5] as to others injured as a consequence of their own play.[6] In reference to the occasional injuries by lightning and other natural forces a reconciliation of apparently different decisions can be had best through the principle, avowed plainly in some cases, that there is no basis for compensation unless the workman was more exposed than the public [7] or than other outdoor workers.[8] Upon this principle has been rested the

[1] Refuge Assurance Co. v. Millar, 49 Sc. L. R. 67; 5 B. W. C. C. 522

[2] Pierce v. Provident Clothing and Supply Co., 4 B. W. C. C. 242.

[3] M'Lauchlan v. Anderson, 4 B. W. C. C. 376.

[4] Wilkes (or Wicks) v. Dowell and Co., 7 W. C. C. 14.

[5] Wm. Baird and Co. v. Burley, 1 B. W. C. C. 7. In the case of Hulley v. Moosebrugger (93 Atl. 79) the New Jersey Supreme Court said: "In the case under consideration, it appears that the prosecutor employed young men and boys. It is but natural to expect them to deport themselves as young men and boys, replete with the activities of life and health. For workmen of that age or even of maturer years to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman is a matter of common knowledge to every one who employs labor. At any rate, it cannot be said that the attack made upon the decedent was so disconnected from the decedent's employment as to take it out of the class of risks reasonably incident to the employment of labor."

[6] Cole v. Evans and Son, Lescher and Webb, 4 B. W. C. C. 138. Furniss v. Gartside and Co., 3 B. W. C. C. 411. Wrigley v. Nasmyth, Wilson, and Co., 6 B. W. C. C. 90.

[7] Kelly v. Kerry County Council, 1 B. W. C. C. 194. Warner v. Couchman, 5 B. W. C. C. 177. Klawinski v. Lake Shore and Michigan Southern Railway Co., 152 N. W. 213.

[8] Hoenig v. Industrial Commission et al., 159 Wisc. 646; 150 N. W. 996.

refusal of compensation to a British sailor, frostbitten on his ship in the port of Halifax,[1] a baker's boy similarly injured while making deliveries,[2] and to a messenger who fell in a faint on the street on a very hot day.[3] One might question whether such a principle is consistent with the theory of workmen's compensation or with its practical beneficence. On very hot and very cold days and during storms the general public are not likely to be about much out-of-doors; and employees who are forced to be about regardless of weather have a true occupational hazard in their necessary exposure to injurious natural conditions. Manifestly out of harmony with the spirit and purpose of workmen's compensation is the comparison of employment with employment. Logically and generally applied, it would mean a refusal of awards for injuries from dangers present in all employments, whether in identical form or in equivalent degree. It is surprising that such a principle should have found acceptance in the liberal Supreme Court of Wisconsin.

Oddly enough, while none of the states have been content with the single phrase which would have corresponded to the ideal and purpose of workmen's compensation, there are some which have used only the temporal phrase, thus providing compensations for injuries suffered "in the course of employment," whether or not these may have been due to the employment, or have arisen out of it. Such is the simple expression in Ohio, Pennsylvania, Texas, and Washington.[4] The Wisconsin statute declares that its benefits are due "where, at the time of the accident, the employee is

[1] Karemaker v. Owners of S. S. "Corsican," 4 B. W. C. C. 295.

[2] Warner v. Couchman, 5 B. W. C. C. 177.

[3] Rodgers v. Paisley School Board, 49 Sc. L. R. 413; 5 B. W. C. C. 547.

[4] Ohio, secs. 68 and 72; Pennsylvania, act 338, sec. 301; Texas, I, secs. 1 and 4; Washington, sec. 5.

performing service growing out of and incidental to his employment " (3, 2). In Nevada the law, having ordained at first (1) that the awards shall be for injuries " arising out of and in the course of the employment," thereafter (25) authorizes payment to every employee " who shall be injured by accident arising out of or in the course of employment." [1]

The cases of injuries received in the course of employment but not arising out of the employment are so familiar, have, indeed, played such a part in the administration of compensation laws that no legislative draftsman or interested legislator can have been ignorant of them. Apparently, therefore, it was the deliberate intent in Ohio, Pennsylvania, Texas, Washington, and Wisconsin [2] to provide the compensations for injuries not properly due to the employment and thus to make the employer something like a general insurer of his employees against accidents or injuries during the course of their employment. The Washington Industrial Insurance Commission has attempted to read into the law of that state a condition that injuries must have been caused by the occupation, must have " occurred out of and incidental to " the employment,[3] a condition

[1] The intent of the legislature in the second of the sections quoted is not easily conjectured. The words quoted are the result of an amendment of 1915, passed after the industrial commission had called attention to the fact that " the words, ' arising out of and in the course of employment,' are conjunctive and not disjunctive. They mean distinct things; hence compensation is restricted to such injuries as both arise out of and are in the course of employment." (Report, 1913–14, pp. 25–26.) Yet the conjunctive expression was left unchanged in the first section.

[2] Contrary to its avowed principle, the Wisconsin Supreme Court appears to have read something into the law in the case of Hoenig v. Industrial Commission et al. (159 Wisc. 646; 150 N. W. 996). Hoenig had been killed by lightning while at work upon a dam. The attorneys for his widow, the claimant, urged pointedly the fact that the Wisconsin statute contains no express limitation to injuries arising out of the employment. But the court, reviewing the history of the act and the course of the decisions in other jurisdictions, concluded that the Wisconsin law " was not intended to include other than industrial accidents or ' hazards incident to the business,' " and held that the deceased had not been more exposed than other outdoor workers. The court was confirming decisions by the court below and by the industrial commission; but it spoke its own mind also.

[3] Annotated edition of the act for 1915, p. 14.

which cannot well be made to prevail in court, in view of the unambiguous provision of the statute (5) that "each workman who shall be injured, . . . he being in the course of his employment, . . . shall receive out of the accident fund compensation in accordance with the following schedule." But in the natural sense of its generous phraseology the Ohio law has been construed and applied habitually by the industrial commission of that state; [1] and a similar construction of the Wisconsin law was formerly given by the Wisconsin Industrial Commission.[2]

To hold an employer liable for injuries not caused by his employment assuredly is not in strict keeping with the theory of workmen's compensation; and, in so far, it is objectionable. But objection need not be strong. The injuries incurred in the course of employment from causes not arising out of the employment are relatively very few and are due largely to the forces of nature, lightning, cold, or heat, or to the passions or tempers of men, in anger or in play. Especially in America, where those engaged in outdoor work, in the landed industries and in transportation, so commonly are excluded from the protection of the compensation laws, those who are protected are exposed to few hazards in the course of their employments save such as grow out of the employments. It can increase but little the employer's charges to broaden the scope of the law. Indeed, the final outcome may be no increase of charges. Experience has shown that often it is a nice and debatable question whether an injury in the course of employment arose out of the employment, whether, for example, the injured employee was more exposed than others to the violence of nature by which he suffered, whether, there-

[1] Bulletin, December 1, 1914, pp. 52, 76.

[2] Annotated edition of act of 1913, p. 7, note 10.

fore, his sunstroke, his freezing, or his injury by lightning should be attributed to his employment. To escape such litigious questions and their attendant expense well may be worth the sacrifice of some detail of theoretical consistency in a statute.

By a closeness of construction which is not beyond that heard frequently in courts of law and which already has been illustrated in compensation cases on both sides of the ocean, a distinction may be made between accident, injury, and disability. An accident may cause injury, or appreciable injury, only after a time; and a known injury may develop but slowly into a disability. In so far as compensation depends upon the accident, injury, or disability arising out of the employment, the distinction is of no consequence. If an accident arises out of any cause, so, too, does a resultant injury or disability. But it is quite possible that from an accident or injury in the course of an employment no injury or disability may result until after the course of the employment is suspended or at an end. Infections are familiar illustrations.

It is of interest, therefore, to note that in no less than 30 of the states the phrasing of the statutes makes the experiencing of the injury in the course of the employment a condition of compensation. In California, Connecticut, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New York, Ohio, Oklahoma, Pennsylvania, Texas, Washington, West Virginia, and Wyoming this is unmistakably and evidently so. In Alaska, Arizona, Hawaii, Indiana, Kansas, Louisiana, Maine, Nebraska, New Jersey, Oregon, Rhode Island, and Vermont the collocation of words, " injury by accident arising out of and in the course of " employment, might make another meaning superficially plausible, as might the phrasing in Minne-

sota were not the adjective character of the phrase, " caused by accident," there emphasized by inclusion between commas. But it is not quite natural to speak of accidents arising: accidents occur or happen. Injuries arise. Moreover, the very expression now under consideration has been construed specifically to our present enlightenment in the case of Fenton *v.* Thorley.[1] There remain, therefore, only Colorado, Nevada, and Wisconsin which state plainly that accident or injury in the course of employment shall be valid basis for compensation, whensoever the injury or disability may develop.[2] In view of the liberal and remedial character of the laws, declared sometimes in the statutes themselves and frequently recognized by the courts, disabled employees are not likely often to lose their awards through a narrow literalness of interpretation; but there is no good reason why legislatures should throw upon the courts the duty of giving to the laws meanings which the law-makers themselves might have given.

Nothing is more vital in workmen's compensation laws, or better known, than their general disregard of personal fault or responsibility as a condition of liability or of right. It is not now in order to describe the conditions of employer's grave fault or remissness under which in several of the states an injured employee may, at his option, either claim compensation benefits or seek other remedy,[3] or under which in a few states payments

[1] 5 B. W. C. C. 1, 5. " The words ' by accident ' are, I think, introduced parenthetically as it were to qualify the word ' injury,' confining it to a certain class of injuries and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design. Then comes the question, do the words ' arising out of and in the course of the employment ' qualify the word ' accident ' or the word ' injury ' or the compound expression ' injury by accident ' ? I rather think the latter view is the correct one."

[2] Colorado, 8, iii; Nevada, 25; Wisconsin, 3. A similar construction may be made of section 66 of the Arizona law, but not of section 71, which directly establishes the benefits.

[3] California, 12 (*b*). Iowa, 3 (*b*). Maryland, 44. New Hampshire, 3. Ohio, 76. Oregon, 22; 24. Texas, I, 5. Washington, 6. West Virginia, 28.

on account of injuries are increased.[1] It is enough here to record the fact that, everywhere, either by direct compulsion of the state or by his own election, according to the nature of the statute, the employer comes under an obligation to pay compensations regardless of his own fault, actual or lawfully imputed. This fact is declared pointedly in several of the statutes;[2] but, whether declared expressly or not, it is the essential foundation of all compensation systems.

For the most part, too, ordinary or trivial faults and remissnesses of the injured employees do not forfeit rights to compensation. But in all the states save Arizona, Illinois, Montana, and Texas no compensations are to be paid on account of injuries caused by the graver faults of the injured.[3] The provisions of the statutes differ somewhat in their strictness and very greatly in their terms; so that their exact purport cannot well be had without direct reference to the statutes.[4] Historically and logically they may be traced back to the British act of 1897, by which benefits were denied to those employees whose injuries were caused by their own " serious and wilful misconduct."

[1] Massachusetts, II, 3. Washington, 9. Wisconsin, 9, 5 (*a*).

[2] (Arizona, 70.) California, 12 (*a*). Maryland, 14. Minnesota, 9. Nebraska, 10. New Jersey, 7. New York, 10. Oklahoma, art. 2, sec. 1. Pennsylvania, act 338, sec. 301. Washington, 1.

[3] In the optional acts there is a source of possible confusion in the fact that the employee's fault which forfeits compensation is not always the same as that which will bar a recovery in an action at law under the liability sections. In New Jersey " wilful negligence " bars recovery in an action (1); but only intentional self-infliction of injury and intoxication forfeit compensation (7). In Texas the employee's fault is not mentioned in the compensation sections; but his " wilful intention " to bring about his injury is good defense in suits at law (I, 1, 3).

[4] Alaska, 4. California, 12 (*a*), 3. Colorado, 8, iii; 61. Connecticut, B, 1. Hawaii, 3. Indiana, 8. Iowa, 2 (*a*). Kansas, 1. Louisiana, 28, 1. Maine, 8. Maryland, 14; 45. Massachusetts, II, 2. Michigan, II, 2. Minnesota, 9. Nebraska, 9; 10; 52 (*d*). Nevada, 2; 39. New Hampshire, 3. New Jersey, 7. New York, 10. Ohio, 68; 72. Oklahoma, art. 2, sec. 1. Oregon, 22. Pennsylvania, act 338, sec. 301. Rhode Island, II, 2. Vermont, 6. Washington, 6; 9 (*b*). West Virginia, 28. Wisconsin, 3, 3; 9, 5 (*b*) and (*d*). Wyoming, 2; 19.

The original British expression survives quite unmodified in Massachusetts and with additions in Connecticut and New Hampshire. Elsewhere it has been modified, and commonly in one or both of two ways, in the direction of greater leniency to employees and by greater explicitness and the addition of specific forms of misconduct, which might or might not have been covered by the more general expression. Apparently for the avoidance of disputes as to degrees of seriousness, the general and fundamental phrase has been changed to "wilful misconduct" in some states [1] and to "intentional and wilful misconduct" in one.[2] Oftener the central phrase is "wilful intention," or "deliberate intention," or an equivalent. Of the additional specifications much the most frequent is intoxication or intoxication while on duty. Others are failure to observe rules or laws of safety, removal or failure to use machine guards, and the like. But each state has its own peculiar phraseology: no two agree fully. And in some the conditions are so easy for the employee that they are nearly the same as none.[3]

As to the general propriety of withholding compensation from a workman who has been injured through his own grave fault there cannot be wide divergence of opinion among those quite free from prejudice in the matter. Men may not agree as to how much of fault may be condoned; but it will strike most as self-evident that benefits ought not to be paid with no regard whatever to the fault of the injured. The wonder is that four states have not accepted the principle. Their reason must be in a knowledge that truly serious fault is very unusual[4]

[1] California, Indiana, Maryland, and West Virginia. [2] Michigan.

[3] Ohio: "purposely self-inflicted." Pennsylvania and Wisconsin: "intentionally self-inflicted." Washington and Oregon: "deliberate intention to produce the injury."

[4] Under the Wisconsin statute of 1911 wilful misconduct did not forfeit compensation in one of more than 5,000 cases (Annotated text of act of 1913, p. 7).

and in a desire to preserve in their statutes the utmost possible simplicity and freedom from points of contention.

On the whole, the conditions of forfeiture in most of the states are not unreasonable. At least, they do not bear unreasonably upon employees. The trend of legislation is toward allowing awards except when the employee has disregarded or thwarted measures for his own safety, has been intoxicated, or has been guilty of conduct approaching or reaching deliberate intention to injure himself or another. But there are two changes, both toward still greater liberality, for which strong argument can be made. There is much to be said for the British policy of allowing compensation to the dependents of fatally injured workmen, no matter what the fault of the deceased. To do otherwise is to make the innocent suffer for the sins of the guilty, and sometimes to make them suffer bitterly. There is something to be said, too, for the policy of reducing and not denying altogether the benefits of those who have been guilty of certain forms of fault, as already is done in a few of the states.[1] The accepted rule that any claimant or plaintiff must make out his case implies that an injured employee must show his innocence of the specified fault. So, too, does the phrasing of the law in a few states.[2] In others, however, the words of the statutes imply rather the contrary;[3] and in some it is declared expressly that the burden of proving the fault shall be upon the employer [4] or that the presumption shall be in favor of the claimant.[5]

[1] Colorado reduces by 50 per cent (61); Nevada by 25 per cent (39); Wisconsin by 15 per cent (9, 5); and Washington by 10 per cent (9).

[2] California, Colorado, Wisconsin.

[3] Iowa, Kansas, Maine.

[4] Hawaii, 3. Indiana, 8. Louisiana, 28, 2. Minnesota, 9. Nebraska, 10. New Jersey, 7. Pennsylvania, act 338, sec. 301. Vermont, 6.

[5] Maryland, 61. New York, 21. Oklahoma, art. 2, sec. 11.

In view of the extremely varied terms in which the conditions of forfeiture are expressed in the several states, it is not possible to make comprehensive and definite comment upon the interpretations of the commissions and the courts. In general, it may be said that the conditions have been construed generously for the injured, very generously indeed in most states and in most cases. The degree of seriousness in misconduct is measured, not by the actual consequences in a particular case, but rather by the consequences which might be anticipated by a reasonable person.[1] "Serious and wilful misconduct is a very different thing from negligence or even from gross negligence. It resembles closely the wanton or reckless misconduct which will render one liable to a trespasser or a bare licensee."[2] It is not necessarily serious and wilful misconduct merely to disobey the directions which an employer has given.[3] It is not intentional and wilful misconduct to violate a factory rule which is not enforced[4] or for a foreigner unable to understand English to refuse to undergo an operation which involves serious peril to life.[5] In Wisconsin under the law of 1911 it was not wilful misconduct to become intoxicated.[6]

The oft puzzling problems of remote, combined, and conflicting causation have been left generally to the discretion of the commissioners and judges who may

[1] Hill v. Granby Consolidated Mines, 1 B. W. C. C. 436. Johnson v. Marshall, Sons, and Co., 8 W. C. C. 10; 22 T. L. R. 565.

[2] Lester Nickerson's Case, 218 Mass. 158; 105 N. E. 604.

[3] Mawdsley v. West Leigh Colliery Co., 5 B. W. C. C. 80. Watkins v. Guest, Keen, and Nettlefolds, 5 B. W. C. C. 307. Chilton v. Blair and Co., 7 B. W. C. C. 607. M'William v. Great North of Scotland Railway Co., 7 B. W. C. C. 875.

[4] Rayner v. Sligh Furniture Co., 180 Mich. 168; 146 N. W. 665.

[5] Jendrus v. Detroit Steel Products Co., 178 Mich. 265; 144 N. W. 563.

[6] Nekoosa-Edwards Paper Co. v. Industrial Commission et al., 154 Wisc. 105; 141 N. W. 1013. "The drinking of intoxicating liquors is wilful in the sense of intentional, but the mere fact of drinking is not misconduct."

administer the laws. Commonly it is for those officers to determine the true causes of injuries. In only a few of the statutes, and chiefly in relations of secondary importance, is any express reference made to partial as against exclusive causation; but in those some short lines are marked plainly for the guidance of the officers administering the laws. In Arizona the benefits generally are payable for injuries due " in whole or in part " to any of the causes specified as entitling to compensation (66). In New Hampshire no awards can be made for injuries caused " in whole or in part by the intoxication, violation of law, or serious and wilful misconduct of the workman " (3) And in Nebraska injuries caused " in any degree " by wilful negligence are not compensated (9). In Maryland (14) and New York (10) it is only as sole cause of injury that intoxication forfeits compensation; and in Kansas there can be no awards for injuries caused solely by intoxication or violation of safety laws (1).

Only a little closer to the real problems of causation is the approach made in the occasional references to proximate causes, by which are to be understood something like true causes. [1] In Colorado (8, iii) all injuries must be caused proximately by the accident; and in California (12) and Wisconsin (3, 3; 9, 3) the regular benefits are payable only when the injuries are caused proximately by the employment or the accident and when deaths are caused proximately by the injuries. In a few other states a connection of proximate causation is required expressly in certain special relations. In Michigan (II, 12) and Montana (12) particular provisions are made for long delayed deaths proximately due to the injuries. In Alaska (4) and Iowa (2) intoxication as proximate cause of injuries forfeits compensation.

[1] City of Milwaukee v. Industrial Commission et al., 160 Wisc. 238; 151 N. W. 247.

There are no awards for injuries of which intoxication is the natural and proximate cause in New Jersey (7) or of which it is the natural or proximate cause in Minnesota (9). In Kansas (9) and Wyoming (6) no injuries received outside of the regular time and place of work are covered by the law unless they are caused proximately by the employer's negligence. In Oklahoma (art. 2, sec. 1) injuries caused directly by intoxication or failure to use machine guards may not be compensated.

In their interpretations of causation the courts have shown a liberality consistent with the spirit and purpose of the laws. The opinion of Lord Loreburn, in the case of Clover, Clayton, and Co. *v.* Hughes, has been quoted with approval and applied in this country. " It seems to me enough if it appears that the employment is one of the contributing causes without which the accident which actually happened would not have happened, and if the accident is one of the contributing causes without which the injury which actually followed would not have followed."[1] Explained by such a generous principle are the awards made in a case of blindness from accident, then insanity, softening of the brain, and death,[2] injury, insanity, and suicide,[3] death as an immediate consequence of bed sores and blood poisoning growing out of treatment for an injury,[4] infection and ankylosis from an unguarded splint used in the treatment of a fracture,[5] as well as many of the awards for disabilities and deaths primarily due to weakness or chronic disease but advanced by industrial injuries

[1] Newcomb v. Albertson, 85 N. J. L. 435; 89 Atl. 928.

[2] Mitchell v. Grant and Aldcraft, 7 W. C. C. 113.

[3] Charles J. Sponatski's Case, 220 Mass.; 108 N. E. 466.

[4] John J. Burns's Case, 218 Mass. 8; 105 N. E. 601.

[5] Newcomb v. Albertson, 85 N. J. L. 435; 89 Atl. 928.

and for injuries which did not manifestly arise out of the employment.

Having satisfied the requirements of the law as to causes, accidents entitle to compensation only if the result, or consequence, also meets certain conditions. In general, these may be described either as personal injury producing disability or death, or as disability or death from personal injury. In either form the definite requirement of a personal injury as the condition of compensation is unnecessary and unfortunate, serving, by itself alone, merely to complicate somewhat the law and its administration.[1] The established fact of disability or death should be, of itself, proof enough of personal injury. The advantage of having, as it were, a visible peg of injury upon which to hang the disability is more apparent than real. Granted the fact of disability, and arbitrators, commissioners, juries, and judges alike may be trusted to find or infer a personal injury behind it. Probably American experience with workmen's compensation reveals not a single instance of benefits denied a disabled workman because of the absence of any personal injury whatever. For personal injury, in that legal usage which must control in the interpretation of compensation laws, is a comprehensive term and by no means is limited to the effects of physical violence, visual contact, or direct lesion.[2] Except as special restrictions prevent, it includes, among other things, the contraction of disease,[3] aggravation of exist-

[1] Early and late no small amount of energy has been expended in courts of law in determining the meaning of personal injury. Any law dictionary or digest will give a hint of this. See, also, the cases cited specifically to this point by the Massachusetts Supreme Judicial Court in the cases of William Hurle (217 Mass. 223; 104 N. E. 336) and Otto F. Johnson (217 Mass. 388; 104 N. E. 735). In a few of the states, Hawaii, Iowa, Montana, and Vermont, it has been thought necessary to enact that personal injury includes death.

[2] William Hurle's Case, 217 Mass. 223; 104 N. E. 336.

[3] Martin v. Manchester Corporation, 5 B. W. C. C. 259.

ing disease,[1] sunstroke,[2] heatstroke,[3] frostbite,[4] insanity,[5] and mental or nervous shock.[6]

Not in all of the American states, however, can so broad an interpretation of personal injury prevail; for there are a number of direct statutory limitations. Already, in another connection, it has been seen that injuries caused by the wilful acts of others are excluded in some states.[7] In others there can be no injuries under the acts without "objective symptoms of an injury," or "injury to the physical structure of the body," or "violence to the physical structure of the body."[8] In still more states general diseases are excluded unless they are the result of injuries in the employment;[9] while Nebraska adds further a specific exclusion of "occupational disease in any form" and "any contagious or

[1] Clover, Clayton, and Co. v. Hughes, 3 B. W. C. C. 275.

[2] Morgan v. Owners of S. S. "Zenaida," 2 B. W. C. C. 19.

[3] Ismay, Imrie, and Co. v. Williamson, 1 B. W. C. C. 232. See also Claim of Elizabeth Ress et al., Bulletin of Ohio Industrial Commission, December 1, 1914, p. 194.

[4] Warner v. Couchman, 4 B. W. C. C. 32; 5 B. W. C. C. 177. Karemaker v. Owners of S. S. "Corsican," 4 B. W. C. C. 295. See also the case of George Dougherty, decided by the Massachusetts Industrial Accident Board (Reports of Cases, vol. ii, p. 661) and the claim of Henry Skougstad, allowed by the Wisconsin Industrial Commission (Fourth Annual Report, p. 31).

[5] Malone v. Cayzer, Irvine, and Co., 1 B. W. C. C. 27. Charles J. Sponatski's Case, 220 Mass.; 108 N. E. 466.

[6] Yates v. South Kirby, Featherstone, and Hemsworth Collieries, 3 B. W. C. C. 418. Wm. Diaz's Case, 217 Mass. 36; 104 N. E. 384. In Massachusetts payments have been granted for such injuries as "highly nervous state and delusions," "a nervous upset and a neurotic condition," etc. In confirming an award for neurosis following injury the Industrial Accident Board has held that "the mental, nervous, or hysterical effects of an accident, such as this employee sustained, are just as much a 'personal injury' as are the physical effects (Reports of Cases, vol. ii, p. 434).

[7] Page 32, note 4.

[8] Louisiana, 38; 39. Minnesota, 34 (*h*). Nebraska, 52 (*d*). Pennsylvania, act 338, sec. 301.

[9] Wyoming: "except as it shall directly result from an injury incurred in the employment" — 6 (*m*). "Except as it shall result from the injury" — Indiana, 76 (*d*); Iowa, 17 (*g*); Vermont, 58 (*d*). "Except as it shall result from injury" — Hawaii, 60 (*d*). Except "such disease or infection as naturally results" from "violence to the physical structure of the body" — Louisiana, 39; Nebraska, 52 (*b*); Pennsylvania, act 338, sec. 301. Except "such disease or infection as may naturally and unavoidably result" from accidental injuries — Maryland, 62, 6; New York, 3, 7; Oklahoma, art. 1, sec. 3, 7. Injuries caused by "some fortuitous event as distinguished from the contraction of disease" — Montana, 6 (*q*); Washington, 3.

infectious disease contracted during the course of employment." Save as the laws of Maryland, New York, and Oklahoma refer to consequences both natural and unavoidable, few of these specific and qualified exclusions probably do more than to emphasize limitations elsewhere carried in the statutes of all these states in the requirement that the injuries to be compensated must be of accidental origin in the employment.

Notoriously, it is the purpose of workmen's compensation laws to provide compensation, or partial compensation, only for pecuniary losses through stoppage or reduction of earnings.[1] But in several of the statutes there are provisions under which benefits sometimes may be claimed or paid regardless of any impairment of earnings or earning capacity. Although it has appeared as yet only in some eight or nine of the states, there is an unmistakably increasing tendency to grant compensations expressly for disfigurements.[2] The reason for this apparent departure from the cardinal principle of workmen's compensation is not far to seek. Inability to secure employment because of an injury is inability to earn because of the injury.[3] And in many positions a disfigured man or woman will be an unacceptable employee, although perfectly capable of perform-

[1] To the extent of receiving more or less of medical and surgical care, all occupational injuries are covered by the laws of most states. But this curative treatment, while of the highest importance for employer and employee alike, is not a part of the compensations, in the strict or usual understanding of the term. In Alaska, Washington, and Wyoming there is no medical care whatever; in Arizona, Kansas, and New Hampshire there is none except as carried in the modest provision for the last sickness and the burial of those who die and leave no dependents. Elsewhere care, without limit of cost or duration in Connecticut and with limits of cost or duration or both in the other states, is provided for all injuries.

[2] 1911: Illinois, 5 (*c*), re-enacted in 1913 and 1915, 8 (*c*). 1913: Wisconsin, 9, 5. 1915: Alaska, 1, G; Colorado, 54 (*a*); Hawaii, 60 (*g*); Indiana, 31; Nevada, 25; Vermont, 58 (*g*). See also California, 15 (*b*), 2, (7). The Alaska awards are stated simply as " for the loss of an ear: $240 " and " for the loss of the nose: $480." As this award for an ear is less than is allowed for a great toe, it probably is not for the loss of hearing.

[3] Ball v. Wm. Hunt and Sons, 5 B. W. C. C. 459. Wm. T. Sullivan's Case, 218 Mass. 141; 105 N. E. 463. Joseph T. Duprey's Case, 219 Mass. 189; 106 N. E. 686.

ing the tasks of the employment. In Hawaii, indeed, and in Vermont the disfigurements to be compensated are only such as result in " diminished ability to obtain employment," in Indiana they are limited to such as " may impair the future usefulness or opportunities of the injured employee," and in Alaska they are mentioned in a schedule of partial disabilities. But in the other states, in Colorado, Illinois, Nevada, and Wisconsin, the compensations are authorized for permanent or for serious and permanent disfigurements, without any reference to diminished abilities or opportunities.[1] The fact that in all the states except Alaska and Illinois the awards are permitted, but not commanded, perhaps implies an expectation that they are not to be made except for disabilities of some sort or for other unusual conditions. But the facts remain that in Illinois they must be made, perhaps also in Alaska, and that in Colorado, Nevada, and Wisconsin they may be made when no disability attends or follows the injury.[2]

In nearly all of the states there are schedules of somewhat definite awards for specific maimings, or dismemberments. In much the greater number of these states the scheduled awards are to be made only for disabilities in connection with the maimings; so that the schedules are nothing more than very rough devices, sometimes very unjust, to spare those administering the laws the trouble of determining the degree and duration of the disabilities. But there are several states, Hawaii,

[1] In Nevada the section of the statute which establishes a " waiting period " (27) declares that " no compensation shall be paid under this act which does not incapacitate the employee for a period of at least seven days "; and in Alaska the corresponding provision is the same except that the period is two weeks (5). The courts must say whether these provisions apply to disfigurements.

[2] A temporary disability is very likely, but not always entirely certain, to attend the injury. In the Illinois statute it is quite clear that the allowances for disfigurement are in addition to the regular benefits on account of temporary disability; and, apparently, it is so in Colorado and Wisconsin also. In Indiana the allowances for disfigurements are exclusive, as they probably are in Alaska, Hawaii, Nevada, and Vermont.

Illinois, Indiana, Massachusetts, Montana, Oregon, Rhode Island, Texas, Wisconsin, and Wyoming, in which the scheduled awards are expressly for the "injuries" described,[1] without direct mention of disability. In three of these states, however, Massachusetts, Rhode Island, and Texas, the provisions of law for the waiting period withhold benefits from all injuries which do not incapacitate for at least certain specified minimum periods. There remain, then, only Hawaii, Illinois, Indiana, Montana, Oregon, Wisconsin, and Wyoming as states in which awards may be made for dismemberments without impairment of ability, whenever such dismemberments are physically possible.

Such very exceptional possibilities, however, scarcely merit serious attention. In all but the ten thousandth case benefits will be claimed and paid only for disability or death from injuries. Death is a simple event, requiring to be measured neither for degree nor for duration; and comparatively simple conditions for its compensation are laid down in all the states except in Oklahoma, where fatal injuries are not covered at all by the law.[2] In nearly half of the states there is no direct or indirect limitation of the time within which death must follow accident or injury, if compensation is to be had; and in these, consequently, any death, no matter how long delayed, will be basis for compensation if, conformably to the law, it is shown to have been due to the employment of the deceased. In others, fourteeen of them,[3] definite periods are fixed, within which death

[1] Hawaii, 14. Illinois, 8 (*e*). Indiana, 31. Massachusetts, II, 11. Montana, 16 (*i*). Oregon, 21 (*f*). Rhode Island, II, 12. Texas, I, 12. Wisconsin, 9, 5. Wyoming, 19 (*a*). Oregon and Wyoming do, in terms, provide the awards for disabilities; but both states define the disabilities as meaning the enumerated dismemberments.

[2] Article 6. The reason was a scruple as to constitutionality, the act being compulsory.

[3] Arizona, 72, 3. Colorado, 57. Connecticut, B, 9. Hawaii, 7; 60 (*c*). Indiana, 37. Louisiana, 8, 1 (*e*). Maryland, 35, 4. Montana, 16 (*h*). Nebraska, 52 (*b*). Ohio, 82. Pennsylvania, act. 338, sec. 301. Vermont, 10. West Virginia, 33. California, except for death preceded by continuous disability, 16 (*b*).

must occur, if compensation is to be payable, the terms varying from 26 weeks in West Virginia to 350 weeks in Nebraska.[1] In still other states a similar effect of limitation is found in provisions that no compensations shall be payable unless claimed within specified terms, as six months in Illinois, one year in New Jersey, and two years in Wisconsin.[2] Similar indirect limitations are found also in some of the states which have directly indicated limits, Colorado and Connecticut thus reducing their terms from two years to one.[3] In view of the possible difference of time between the accident and the injury or disability, it must be noted that some states date their periods of lawful notice and claim from the accident and some from the injury. Colorado and New Jersey use now one bound and now the other.

There can be but one motive for imposing such limitations, a realization of the difficulty of tracing reliably the causal connections when death is long delayed. Against this should weigh the fact that an interval between injury and death, however it may dull the pangs of grief, is likely to diminish rather than to increase the ability of dependents to endure the loss of their breadwinner and that, therefore, the longer the interval the more crushing the loss. If medical men declare it very difficult to connect a long delayed death with a cause of years before, the legislature must defer to their expert judgment. But the very wide variation

[1] West Virginia, 26 weeks. Arizona and Montana, 6 months. California and Louisiana, 1 year. Colorado, Connecticut, Maryland, Ohio, and Vermont, 2 years. Indiana and Pennsylvania, 300 weeks. Nebraska, 350 weeks. The Hawaiian law gives 6 months in one section, 7, and 2 years in another, 60 (c).

[2] Illinois, 24. New Jersey, 23. Wisconsin, 11. Iowa (9), Minnesota (19), and New Jersey (15) have further the identical provision that " unless knowledge be obtained, or notice given, within ninety days after the occurrence of the injury, no compensation shall be allowed." Here, however, the injury may be construed as the death and not as the accident or the original injury; indeed, in Iowa it is enacted expressly that injury includes death resulting from injury (17).

[3] Colorado, 62. Connecticut, B, 21. The courts may decide which of the conflicting provisions shall prevail.

in the lengths of the terms set in the several states, as well as the entire absence of limitations in nearly half of the states, prevents our believing that our legislators have been guided by established principles of medical jurisprudence.

Fortunately, fatal injuries in American industry are the exception. Increasingly definite and reliable reports to and from industrial commissions, made under workmen's compensation laws, are proving that the rough and indirect estimates of industrial fatalities which have been appearing for several years have gone beyond the sad facts. From 90,239 accidents reported to the Massachusetts industrial accident board for the year, 1912–13, only 545 deaths resulted.[1] In Washington the 48,321 accidents reported to the Industrial Insurance Commission from October 1, 1911, to September 30, 1914, caused only 923 deaths.[2] Among 52,853 claims presented to the Ohio Industrial Commission against the state fund from March 1, 1912, to September 1, 1914, only 266 were for fatal injuries.[3] Among the 41,200 cases settled under the workmen's compensation law by the Wisconsin Industrial Commission from July 1, 1914, to June 30, 1915, but an even 200 grew out of deaths.[4] In California, in the first six months of 1914, there were reported to the Industrial Accident Commission 26,958 accidents; and of these just one per cent, 269, were fatal.[5] In Nevada there were, indeed, 53 deaths from only 1,849 accidents reported from July 1, 1913, to December 31, 1914;[6] but in Texas there were only 81 deaths from the 18,888 accidents reported to the Indus-

[1] First annual report, p. 7.

[2] Third Annual Report, p. 93.

[3] Bulletin of the commission, January 1, 1915, p. 10.

[4] Fourth Annual Report, p. 41.

[5] Report for 1913 and January–June, 1914, p. 37.

[6] Report of Industrial Commission, p. 91.

trial Accident Board from September 1, 1913, to August 31, 1914.[1] As absolute figures, these are truly impressive: they mean a great loss to the states and to industry, and they mean great loss and great misery for the families of the deceased. But, if thrown together in a quite unscientific manner, they show but 2,337 deaths from 280,308 accidents. Fatal injuries, therefore, appear few, as they must appear of minor economic consequence, when brought into comparison with the non-fatal injuries of employment. If there are thousands killed at their work each year in the United States, there are hundreds of thousands injured. It is in the provision for non-fatal injuries, which cause only a more or less serious impairment of productive power and earning capacity, that the most difficult problems, and the greatest beneficence, of workmen's compensation may be seen.

In contrast with fatalities, disabilities vary greatly both in degree and in duration. And not all of them can be covered by any compensation law. Perhaps, it may be conceded that, ideally, all ought to be compensated. Certainly the burdens of them all must be carried, by somebody and in some way. But there is an irreducible minimum of labor and expense involved in the proper administration of any case, even the smallest and simplest; and it cannot be widsom to incur this labor and expense for very trifling disabilities. Perhaps it is not an unreasonable present compromise with the ideal, if industry, or the employer, bears the costs of curative treatment for all injuries, while injured workmen and their families endure the loss of earnings attending the least serious disabilities.

Disabilities might be pronounced little serious, and therefore negligible in a compensation law, either

[1] First Annual Report, pp. 3–5.

because they are very slight in degree or because they are of only brief duration. Probably the former criterion would be the more difficult of fair application. Certainly it has no real part in the theory of the American statutes.[1] In practice slight impairments of capacity are likely to be disregarded generally. Except under some system of piece wages, they will not reveal themselves promptly in the pay envelope; and, in any ordinary circumstances, inertia will prevent a great many of the slightly injured from claiming compensation. But, in the theory of the law, even the slightest impairment of capacity is just basis for an award. Nevada makes express provision for converting petty periodical payments into larger amounts for shortened terms;[2] and the California legislature of 1915 has fixed in the statute of that state the policy of the industrial accident commission by carrying the scale of awards down as low as 1 per cent of disability.[3]

On the other hand, it is the common practice to grant no benefits unless the injury results in a disability continuing through or beyond a specified term, the so-called "waiting period." There is no waiting period whatever in Oregon or in Washington.[4] There is none for disabilities which continue more than two weeks in Arizona,[5] for three weeks or more in Nevada,[6] for more than

[1] In the Washington statute (5) there is a declaration that "no compensation shall be payable out of the accident fund unless the loss of earning power shall exceed five per cent." As this provision is part of a subsection fixing awards for temporary total disabilities, a real meaning for it is not easy to find. The Industrial Insurance Commission has done its best with the puzzle by construing it to mean a loss of five per cent of the month's wages. But, in practice, the strange provision has been ignored; and the annual reports of the commission show awards for disabilities as low as half of 1 per cent. In Montana, too, workmen partially disabled can have no compensations if still able to earn as much as $10 a week — 16 (*c*).

[2] Sec. 25.

[3] Sec. 15 (*b*), 2 (5).

[4] Oregon, 21. Washington, 5.

[5] Expressly and unmistakably the provision applies only to total disabilities (72, 1); but the context and phrasing would rather imply a general application.

[6] 27.

four weeks in Wisconsin,[1] or for eight weeks or more in Alaska, Michigan, and Nebraska.[2] There is none for any permanent disabilities in Minnesota,[3] for permanent total disabilities in Illinois,[4] or for partial or permanent total disabilities in Wyoming.[5] Much the most common general term is two weeks, which is found in twenty-two of the states;[6] but the apparent extremes are one week, in seven states[7] and three weeks, in Colorado,[8] with Connecticut and Wyoming (for temporary total disabilities) at ten days.[9] The apparent meanings of the statutes, however, are modified in minor ways, some doubtless intended by the legislatures and some perhaps not intended. In some of the states the periods are dated with evident care from the time of disability;[10] but in more either the exact meaning is obscure and ambiguous or the period dates from the time of the injury or the accident. And experience already has shown that a delayed disability may nullify the stipulation of a waiting period dated from the time of injury.[11]

[1] 9, 2.

[2] Alaska, 5. Michigan, II, 3. Nebraska, 19.

[3] 17; 13 (*c*) — (*e*).

[4] 8 (*f*).

[5] In Wyoming partial and permanent total disabilities are compensated with lump sums, 19 (*a*) and (*b*).

[6] Alaska, 5. Arizona, 71. California, 15, (*b*). Hawaii, 13; 14. Indiana, 28. Iowa, 10 (*g*). Kansas, 1 (*a*); 11 (*b*) and (*c*). Louisiana, 8, 4. Maine, 9. Maryland (partial and temporary total), 48; 35, 1. Massachusetts, II, 4. Michigan, II, 3. Minnesota, 17. Montana, 16 (*g*). Nebraska, 19. New Hampshire, 3; 6, 2. New Jersey, 13. New York, 12. Oklahoma, art. 2, sec. 3. Pennsylvania, act 338, sec. 306 (*d*). Rhode Island, II, 4. Vermont, 15; 16.

[7] Illinois, 8 (*b*): one reading might make it six days. Maryland (permanent total), 35, 1. Nevada, 27. Ohio, 78. Texas, I, 7. West Virginia, 30. Wisconsin, 9, 2.

[8] 52.

[9] Connecticut, B, 8. Wyoming, 19 (*c*).

[10] So, apparently, in California; Colorado; Connecticut; Hawaii; Illinois (but see the subsection, 8 (*f*); Kansas; New York; Pennsylvania; Vermont; West Virginia; Wisconsin.

[11] A Massachusetts workman was injured February 10, but continued at work until March 22. The industrial accident board awarded compensation from March 23. But why not from February 25? The statute declares that "if incapacity extends beyond the period of two weeks, compensation shall begin on the fifteenth day after the injury."

Except, perhaps, in the schedules of awards, no detail of policy in workmen's compensation is debated more warmly than the waiting period. The larger elements of the problem are well known on all sides. It is a hardship for the average workman's family to lose altogether [1] the income of even a very few weeks; indeed, it is a hardship for most and a great hardship for many. The briefer disabilities are much the most numerous; [2] so that, notwithstanding the shortness of their terms, their inclusion would increase greatly the costs of compensation. There is a certain amount of expense involved in the administration of every case; and for the slightest and briefest disabilities this may amount to more than the award is worth. The opinion of American employers is against any present and great reduction of the waiting period; and a forced reduction might decrease the good spirit with which they have accepted

[1] The term, " waiting period," is not happily chosen. A period of waiting, of indefinite length, there must be in all normal cases, until after the claim is allowed. The question is whether payment ever is to be recovered for the first days or weeks of disability. Usually, also, it is a question of total loss. Temporary partial disabilities, with no early time of total disability, are so rare that they scarcely figure in the accounts of the commissions: the first annual report of the Massachusetts Industrial Accident Board shows none at all among 89,694 injuries (page 8 and table xii).

[2] Data prove this everywhere. Reports of American commissions (California, 1913–14, p. 76; Washington, 1914, p. 104; Wisconsin, 1914–15, pp. 41, 45; Massachusetts, 1912–13, p. 8) and Dr. I. M. Rubinow's generalized conclusions (Standard Accident Table, p. 38) yield figures which may be thrown into the following table, altho the data are not closely comparable. The figures show the numbers of disabilities ending in the periods indicated at the left.

Period	California	Washington 1913	Washington 1914	Wisconsin	Massachusetts	Rubinow
1st week	8,711	1,681	1,816	13,435	68,586	37,225
2nd "	3,550	3,157	3,138	3,836		24,019
3rd "	1,629	2,113	2,175	2,473	10,568	12,145
4th "	1,041	1,365	1,262	1,363		7,002
5th "	711	1,139	1,164	998		4,452
6th "	441	658	555	559	6,638	2,693
7th "	322	439	469	593		1,747
8th "	217	281	277			1,178
9th "	157	330	349			921
10th "	76	160	150			586
11th "	74	138	157	457	2,355	444
12th "	59	100	91			355
13th "	37	131	225			285
Later	106	688	758	327	1,547	1,141

the compensation system. There are some observers who believe that the greater danger of malingering is for the short-term benefits.

There is no established and unquestioned standard for comparing these diverse elements; and nobody should be quick to affirm confidently just what is the best term for the waiting period in the United States. Perhaps the American states have chosen the wiser course in first fixing a rather long term, with the expectation of reducing it as experience may appear to warrant.[1] But our laws are so much less generous in this regard than the laws of most foreign countries that one cannot avoid a suspicion that we are too strict.[2] The considerations which have been mentioned as making for a waiting period in the United States are of practical weight with us; and those who urge its complete and prompt abolition should bear in mind that neither workmen's compensation nor any other device or policy can end quite all of the hardships which flow from industrial accidents. But, on the other hand, one should never forget that there are pains and woes in all these hundreds of thousands of injuries which the very nature of the situation fixes inexorably upon the injured and their families. Beyond what is truly necessary we should not fasten upon them also privation and a lowered standard of living with all their unhappy and lasting consequences. That would be not only cruel but

[1] In 1915 Connecticut reduced from two weeks to ten days; and Minnesota from two weeks to one, as well as abolishing altogether for permanent disabilities.

[2] There is no waiting period in Italy, Liechtenstein, Nuovo Leon, Peru, Portugal, Russia, Serbia, Spain, or Venezuela. Two days is the term in the Netherlands, and in Switzerland, three days in Austria, Cape of Good Hope, Germany, Hungary, Luxemburg, and Norway, four days in Greece, five days in France, six days in Finland, seven days in Belgium, the United Kingdom, Newfoundland, New Zealand, Ontario, Quebec, South Australia, Tasmania, and Transvaal, two weeks in Alberta, British Columbia, Manitoba, New South Wales, Nova Scotia, Queensland, Roumania, and West Australia, sixty days in Sweden, and thirteen weeks in Denmark (Bulletin no. 126, United States Bureau of Labor Statistics, pp. 133–135).

also uneconomical, practically and in the long run. Countries abroad and states within our own nation have found that a waiting period not longer than one week is quite practicable in every way and quite endurable for employers and for industry. The adoption of a uniform term of one week throughout the United States would mean a great relief for hundreds of thousands each year whose lives are at the best none too easy and bright.

American lawmakers, apparently, have assumed that injury or disability is always the instantaneous consequence of accident, if it is coming at all; and frequently they have made no appropriate provision for the tardy development of disability, such as may not merely disturb the arrangements for waiting periods [1] but even deprive the disabled altogether of benefits under the law. Except for one unimportant relation in Alaska,[2] there are no terms set directly, within which disabilities must have followed injury or accident, if they are to be compensated; but there are a great many indirect limitations of time, in the requirements that notices of injury and claims of compensation must be presented or that proceedings for the enforcement of rights must be started within certain terms.[3] In several of the states, Alaska, Nevada, New York, Ohio, Oregon, Washington, Wyoming, and possibly one or two more the requirements of notice, claim, and action are dated from the development of disability or the accrual of the right; and in Hawaii, Indiana, and Massachusetts there are no requirements which may not be waived for good reasons.

[1] See page 55, note 11.

[2] Sec. 2 — for an increase in the seriousness of a disability.

[3] In most of the states the requirements of notice of injury, and in some the requirements of claims of compensation, are not unconditional: they may be waived for good reasons, as the employer's actual knowledge or the absence of prejudice to him. But the requirements of proceedings to enforce rights are more rigid. It is to these that reference is made chiefly in the text.

But in a majority of the states there are provisions which, if enforced as they stand, must deprive an indeterminate number of persons of their benefits. The Illinois statute may serve as illustration.[1]

An examination of the rules for measuring the degree of disability belongs in a discussion of the schedules of awards rather than here. Here, however, it is relevant to take account of the principles by which the fact of disability is determined, whatever the degree of the disability may be. The test for disability is not incapacity to perform the operations of employment, but rather inability to earn. So the courts have held both in the United Kingdom and in this country, even though the statute refers to "incapacity for work."[2] Disability, therefore, arises not only from every variety of physical and mental injury which destroys or reduces the worker's ability to go through the tasks of his employment but from every injury or condition, such as disfigurement, which hinders his securing employment. It is not necessarily reflected in a realized reduction of earnings nor necessarily inconsistent with a continued receipt of full customary wages,[3] but may be constructive, or inferential, as reasonably certain to be realized in the future, if the physical efficiency of the worker in the ordinary pursuits of life has been impaired substantially.[4]

The disability of an injured worker may be proved or measured either in the same occupation in which he was

[1] "No proceedings for compensation under this act shall be maintained unless claim for compensation has been made within six months after the accident, or in the event that payments have been made under the provisions of this act, unless written claim for compensation has been made within six months after such payments have ceased" (24).

[2] Ball v. Wm. Hunt and Sons, 5 B. W. C. C. 459. International Harvester Co. v. Industrial Commission et al., 157 Wisc. 167; 147 N. W. 53. Gorrell v. Battelle, 93 Kans. 370; 144 Pac. 244. Wm. T. Sullivan's Case, 218 Mass. 141; 105 N. E. 463. Joseph T. Duprey's Case, 219 Mass. 189; 106 N. E. 686.

[3] De Zeng Standard Co. v. Pressey, 86 N. J. L. 469; 92 Atl. 278. Thomas Septimo's Case, 219 Mass. 430; 107 N. E. 63.

[4] Burbage v. Lee et al., 93 Atl. 859.

engaged when injured or in some other occupation. Perhaps neither standard alone is wholly satisfactory. If a workman is disqualified for continuing at his customary employment, for a time at least he has suffered the disability which it is the purpose of compensation laws to relieve. But his disability is at an end or is reduced as soon as he has been restored to his former position and earnings or has found some other gainful occupation. It is, therefore, not an unreasonable principle that the occurrence of the disability should be proved in the regular employment of the injured, but that its continuance and degree should be ascertained by proper reference to any other suitable occupation. Substantially this is the principle expressly embodied, more or less consistently, in a few of the statutes; [1] but in a larger number of states the provisions of the sections are incapable of literal and humane application, since they state or imply, more or less generally and more or less clearly, that disability means inability to work in any suitable, or gainful or reasonable occupation.[2] And in still more of the states, fifteen in fact, there is no statutory indication as to how disability is to be proved or measured.[3] Michigan is unique in that she both proves and measures disability always by reference to the employment in which the injury was received.[4] The

[1] Arizona, 71 and 72, 1 and 2. Connecticut, B, 8 and 12. Illinois, 8 (*d*). Kansas, 1 (*a*) and 12 (*f*).

[2] Colorado, 4 (*i*). Hawaii, 13; 14. Indiana (?), 29; 30; 32. Louisiana, 8, 1. Maryland, 35, 4 and 3. New Hampshire, 6, 2. New York, 15, 4 and 3. Oklahoma, art. 2, sec. 6, 4 and 3. Oregon, 21 (*b*) and (*d*). Vermont, 15; 16. Washington, 5 (*b*) and (*d*). Wisconsin (?), 10, 1 (*d*), 2. Wyoming, 19 (*c*).

[3] Alaska, 1; 5. California (?), 15; but see 18. Iowa, 10. Maine, 9; 14; 15. Massachusetts, II, 9 and 10. Minnesota, 13. Montana, 16, (*a*) — (*c*). Nebraska, 21. Nevada, 25. New Jersey, 11. Ohio, 81. Pennsylvania, act 338, sec. 306 (*a*) — (*c*). Rhode Island, II, 10 and 11. Texas, I, 10 and 11. West Virginia, 31.

[4] II, 11. This strange provision was copied from the Wisconsin act of 1911. Wisconsin rejected it after the Supreme Court had allowed a shingle sawyer compensation for total disability on account of the loss of his left thumb and index finger (Mellen Lumber Co. v. Industrial Commission et al., 154 Wisc. 114; 142 N. W. 187).

misfortune of loose drafting in the statutes is at its minimum here, where commissioners and courts nearly always can make easy, just, and satisfactory interpretations. But looseness of expression is always unfortunate; and it should have been as easy to find apt words in the other states as in Arizona, Connecticut, Illinois, and Kansas.

American advocates of progressive public policies have congratulated their country upon the rapid acceptance of workmen's compensation in state after state. Now nearly three-fourths of the population and more than three-fourths of the industries are within the compensation area. But it would be a great error to infer that three-fourths of those who suffer in this country through industrial injuries receive compensation. In none of the thirty-three compensation states are all occupations brought within the field of the law. Some of the largest and the most dangerous are left out, often or generally. So it is with agriculture, which is dangerous and very large, and with interstate railroading, which is large and very dangerous. Then there are casual labor, domestic service, outwork, employment not for profit, employment in mercantile, professional, and personal occupations, clerical work, some forms of public service, and employment, at whatever work, in small numbers together, all omitted here or there. Not very much more than half of all the employees in the compensation states can be affected in any manner by the laws.

Moreover, in only eight or nine [1] of the thirty-three states does the law apply regardless of the wishes of employer and employee. In the others its acceptance is for their election, under the well known pressure of the

[1] California, Hawaii, Maryland, New York, Ohio, Oklahoma, Washington, Wyoming. The Arizona law is nominally compulsory; but either employer or workman may "disaffirm" it (78).

optional acts. And the fullness of elections varies greatly from one to another of the optional states.[1] Due reckoning must be made also of the few who fail of compensation because their injuries were not accidental or did not develop quickly into disabilities and of the many thousands who are cut off because their disabilities do not continue more than one, two, or three weeks. Not three-fourths of those who suffer through industrial injuries in the United States receive compensation. The true figure is nearer one-fourth. It may be less for the whole country, as certainly it is less for some of the so-called compensation states.

Very far, then, from its ideal is the present compensation legislation of the American states. Very imperfect it is, and in other relations as well as in its scope. But it does not follow that great changes ought to be made at once. As Roman Horace knew, nothing is perfect in every part. And so it must be as long as to see a perfect man is beyond hope. Inconsiderately to rush toward the ideal is visionary in the evil sense of the term and is scarcely less unwise and dangerous than inert contentment with known and mendable imperfections. It is like hurriedly holding a bee line toward the nearest bank of a morass in which one may find himself. The wiser policy and the surer way of early and permanent advance are through a cautious and conservative radi-

[1] The Massachusetts Industrial Accident Board in its first annual report (p. 23) estimates at about 600,000 the employees covered by the system, while 200,000 more who were eligible were not covered; and in 1910 there were 1,531,068 persons of ten years and more, employees and others, in gainful occupations within the state. In Texas there were 109,735 employees covered in 1913–14 (Annual Report, p. 3), as against 1,556,866 persons in gainful occupations in 1910. The Wisconsin Industrial Commission reports " more than 250,000 " under the protection of the law, June 30, 1915; while those in gainful occupations in 1910 were 892,412. The Nevada Industrial Commission up to December 31, 1914, gives 10,709 as the average number within the protection of the act (Report, p. 8), while those gainfully occupied in 1910 were 44,910. September 1, 1914, the number under the protection of the system in New Hampshire fell from 23,078 to 18,238 (10th Biennial Report of the Bureau of Labor, p. 12), altho the number in gainful occupations in 1910 was 191,703. Not very far from two-thirds of those in gainful occupations, agriculture included, are employees.

calism, which holds inexorably to the ideal as a constant, though distant, goal but is content to work toward it stage by stage and with a sane recognition of present obstacles and hindrances. And the first part of such a wise policy is to take sober and unsparing account of the differences between the actual and the ideal. It would be most unfortunate were we to fall into a belief that our workmen's compensation legislation is now near its ideal.

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